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THE CHANGING FACE OF VESTED RIGHTS IN TEXAS LAND DEVELOPMENT: A NEW HAT FOR AN OLD LAW

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The holy grail for developers is the concept of vested rights.[1] A tradition in Texas law, the Texas Legislature has recently given vested rights a new hat by offering greater protection than ever before.[2] Recent legislative changes to chapter 245 of the Texas Local Government Code have expanded vested rights far beyond the protections afforded to owners and developers in the past.[3] Chapter 245 governs the issuance of permits for local development, and contains what is typically known as a "grandfather clause"[4] protecting owners and developers from changes in laws that occur during the pendency of a development project.[5] Chapter 245 is the key statute in determining which local rules will apply to new development, what rights are "vested," and the point in time in which vesting is triggered.[6] However, the recent changes in the law have also led to questions as to the degree to which municipalities will honor the expansion of vested rights.[7] Specifically, there are open-ended questions related to the

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1. *See* BLACK'S LAW DICTIONARY 1324 (7th ed. 1999) (defining a "vested right" as "[a] right that so completely and definitely belongs to a person that it cannot be impaired or taken away").

2. *See* Arthur J. Anderson, *Landowner's Approach to Land-Use Litigation*, 32 URB. LAW. 587, 601 (2000) (discussing the limited vested rights protections traditionally afforded by Texas courts as opposed to the broadened concept of vested rights now espoused by Chapter 245 and recent court decisions).

3. *See id.* (examining the common law rule articulated in the "dusty case law," asserting that it afforded limited protections, and discussing recent legislative and judicial developments that have broadened the protection of vested rights). *See generally* TEX. LOC. GOV'T CODE ANN. § 245.001–.007 (Vernon 2005) (outlining expansive vested rights, the time frame in which vesting is triggered, and those local rules which apply to a new development).

4. *See* BLACK'S LAW DICTIONARY 706 (7th ed. 1999) (defining a "grandfather clause" as "[a] statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect").

5. TEX. LOC. GOV'T CODE ANN. § 245.001–.007 (Vernon 2005).

6. *Id.*

7. Alan J. Bojorquez, *Permit Processing: Are You Really Grandfathered?*, 2007 U. OF TEX. LAND USE PLAN. L. CONF. 3–4 (posing numerous questions that Chapter 245 does not answer, including the manner by which municipalities may invoke the statute's protections and the procedure by which a developer can ensure that its vested rights are protected) (on file with the *St. Mary's Law Journal*).

nature of vested rights in light of problems owners and developers face when confronted with common local rules because those issues are not expressly addressed in the statute's language.[8]

The following is a detailed analysis of Chapter 245 and the current status of vested rights with regard to land development in Texas. Section I of this article provides the background of vested rights in Texas, including a glimpse at common law vested rights and the first codification of vested rights. Section II outlines Chapter 245, and section III examines recent legislative amendments to the statute. Finally, section IV examines the current status of vested rights, explores various aspects confronted by developers, and opines as to the protection afforded developers under the current state of vested rights law.

I. THE ONTOGENY OF VESTED RIGHTS IN TEXAS LAND DEVELOPMENT

A. *Common Law Vested Rights*

Vested rights in Texas have gone through several incarnations.[9] Historically, Texas followed the general common law rule that the right to develop property was subject to intervening regulations or regulatory schemes.[10] In *Connor v. City of University Park*,[11] the Fifth Court of Appeals at Dallas concluded that because the City had the right to amend an ordinance under then applicable statutory authority, no rights vested at the time of the initial permit application.[12] Accordingly, the court stated:

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8. *Id.*

9. Act of May 24, 1995, 74th Leg., R.S., ch. 794, § 1, 1995 Tex. Gen. Laws 4147 (codified at TEX. GOV'T CODE ANN. § 481.141–.143 (Vernon 2005)); *see also* Act of June 1, 1997, 75th Leg., R.S., ch. 1041, § 51(b), 1997 Tex. Gen. Laws 3943, 3966 (repealing the Act of May 24, 1995); Act of Apr. 29, 1999, 76th Leg., R.S., ch. 73, §§ 1, 2 1999 Tex. Gen. Laws 431, 432 (current version at TEX. LOCAL GOV'T CODE ANN. §§ 245.001–.006 (Vernon 2005)) (realizing that the statute was "inadvertently repealed" and reenacting the statute).

10. *See, e.g.*, Connor v. City of Univ. Park, 142 S.W.2d 706, 709 (Tex. Civ. App.—Dallas 1940, writ ref'd) (asserting that the city had the power to amend the ordinance in question and that the appellant's rights did not vest when he submitted his permit application).

11. Connor v. City of Univ. Park, 142 S.W.2d 706 (Tex. Civ. App.—Dallas 1940, writ ref'd).

12. *Id.* at 709.

> [W]e think, the governing body of the City, in the proper exercise of the police power, was authorized, pending the litigation, to amend the ordinance in the respects mentioned, as appellant acquired no vested right by reason of having filed an application for a permit to remodel and use the residence as an office for the practice of dentistry. It follows therefore, that, if either of the last two amendments adopted is valid, the rights of the parties are to be determined as of the present time, rather than the time the application for a permit was made.[13]

In following this rule, Texas "provided some of the most limited . . . vested rights protections in the country."[14] An enactment amending an existing ordinance was presumed valid.[15] Under these circumstances, a new ordinance would only be invalidated upon a showing that the city acted arbitrarily and unreasonably in amending the existing ordinance; that the new ordinance was discriminatory, violated the owner's rights under the basic ordinance, and bore no substantial relation to the city's police powers; that the ordinance constituted unjustifiable spot zoning; and that it was void.[16] This rule was even extended to cover situations in which "a city has placed its zoning machinery in operation before the permit is applied for."[17] In fact, courts would only conclude that construction on a project constituted a vested right if the work was "wellnigh completed."[18] Thus,

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13. *Id.*; *accord* McClain v. City of Ennis, 340 S.W.2d 66, 66 (Tex. Civ. App.—Waco 1960, no writ) ("A property owner and his property are subject to a Zoning Ordinance adopted subsequent to his application for a building permit . . . .").

14. Arthur J. Anderson, *Landowner's Approach to Land-Use Litigation*, 32 URB. LAW. 587, 601 (2000).

> We do not agree with the court's conclusion of law that these subsequent ordinances do not apply to appellee. All property is held subject to the lawful exercise of the police power. No vested rights can be acquired to avoid the valid exercise of a municipality's police power. And the rule is applicable though an application for a building permit may have been made and a suit filed prior to the passage of a valid ordinance.

Town of Renner v. Wiley, 458 S.W.2d 516, 522 (Tex. Civ. App.—Dallas 1970, no writ).

15. Weaver v. Ham, 149 Tex. 309, 317, 232 S.W.2d 704, 709 (1950).

16. *Id.* at 317–18, 232 S.W.2d at 709; *see* City of Garland v. Valley Oil Co., 482 S.W.2d 342, 345–46 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (holding that because the regulation was not arbitrary and unreasonable, it was "a valid exercise of the city's police power").

17. City of Dallas v. Crownrich, 506 S.W.2d 654, 660 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.).

18. Brown v. Grant, 2 S.W.2d 285, 287–88 (Tex. Civ. App.—San Antonio 1928, no writ).

common law vesting occurred only if the owner or developer had taken substantial steps toward completion prior to the enactment of a new ordinance.[19]

B. *Texas's First Vested Rights Statute*

The general rule forbidding vested rights changed, however, when the Texas Legislature enacted subsections 481.141–.143 of the Texas Government Code.[20] Effective September 1, 1987, "the Vested Rights Statute allowed a landowner to vest zoning rights by filing a plat."[21] In *Sheffield Development Co., Inc. v. City of Glen Heights*,[22] the Texas Supreme Court held that because of the applicability of the Vested Rights Statute, the trial court erred in precluding the developer from seeking a declaration that its development rights were fixed at the time the plat was originally filed.[23] The Vested Rights Statute applied to fix rights at the time the first permit was filed, even if the project required a series of permits.[24]

Two key decisions interpreted this original Vested Rights Statute: *Williamson Pointe Venture v. City of Austin*[25] and *FM Properties Operating Co. v. City of Austin*.[26] In *Williamson*, the

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19. *Id.*; *see* Arthur J. Anderson, *Landowner's Approach to Land-Use Litigation*, 32 URB. LAW. 587, 601 (2000) (stating that under Texas case law, landowners and developers could not establish vested rights unless they could show substantial completion or expense prior to the new ordinance taking effect).

20. Quick v. City of Austin, 7 S.W.3d 109, 128 (Tex. 1998) (recognizing the Texas Legislature's amendment to the rule that "the right to develop property is subject to intervening regulations or regulatory changes").

21. Sheffield Dev. Co. v. City of Glen Heights, 140 S.W.3d 660, 665 (Tex. 2004); *see* Act of May 30, 1987, 70th Leg., R.S., ch. 374, § 1, sec. 7.003(a), 1987 Tex. Gen. Laws 1823, 1874 (amended 1995) (current version at TEX. LOC. GOV'T CODE ANN. § 245.001–.007 (Vernon 2005)) (declaring its effective date to be September 1, 1987).

22. Sheffield Dev. Co. v. City of Glen Heights, 140 S.W.3d 660 (Tex. 2004).

23. *Id.* at 665, 680–81.

24. *See, e.g.*, *Quick*, 7 S.W.3d at 124–26 (holding that because the statute had been repealed, the court lacked jurisdiction to decide whether the landowner's rights were fixed when the original permit was filed even with regard to subsequent permits, but explicitly leaving intact the court of appeals' holding that the landowner's rights vested when the first permit was filed); Hartsell v. Town of Talty, 130 S.W.3d 325, 328 (Tex. App.—Dallas 2004, pet. denied) (stating the general rule that rights vest when the first permit in a project is filed, regardless of others that follow).

25. Williamson Pointe Venture v. City of Austin, 912 S.W.2d 340, 342–45 (Tex. App.—Austin 1995, no writ).

26. FM Props. Operating Co. v. City of Austin, 93 F.3d 167, 169 (5th Cir. 1996).

Third Court of Appeals (Austin) concluded that rezoning was not a "permit" as defined under the statute.[27] In *Williamson*, the City of Austin zoned property in the Williamson Creek watershed to allow for single-family development.[28] In 1985, the owner of the property filed, and the city approved, a preliminary subdivision plat; however, the owner never sought final plat approval.[29] In 1986, the owner sought a rezoning application to allow for multi-family use, and the city granted the application in 1987.[30] Subsequently, the new owner of the property attempted to rely upon the governing ordinance in effect at the time of rezoning.[31]

The court of appeals held that the property owner had no vested rights.[32] The court based its conclusion on the idea that zoning is a legislative act that was not included in the plain language of the definition of "permit."[33] Additionally, the court explained that even if zoning could be interpreted to be a "permit," the city council was not a "regulatory agency" as defined by the statute.[34]

In *FM Properties Operating Co.*, the City of Austin divided land development activities in the city into two projects, each involving separate permits.[35] The first project included the series of permits necessary to subdivide and plat raw land into legal lots, and the second project included the series of permits required for vertical construction on existing lots.[36] The city based its decision on its interpretation of the Vested Rights Statute.[37] FM Properties sued, alleging a violation of 42 U.S.C. § 1983.[38] In reviewing FM Properties' claim, the Fifth Circuit concluded that the city had not acted arbitrarily or capriciously and, therefore, the developer's substantive due process rights had not been violated.[39] The Fifth

27. *Williamson*, 912 S.W.2d at 342–45.
28. *Id.* at 341.
29. *Id.*
30. *Id.*
31. *Id.* at 341.
32. *See Williamson*, 912 S.W.2d at 341 (holding that the owner did not gain vested rights by applying for rezoning because rezoning is not a "permit" entitling the property owner "to comply only with standards existing at the time of rezoning").
33. *Id.* at 343.
34. *Id.*
35. *Id.*
36. *FM Props.*, 93 F.3d at 169.
37. *Id.*
38. *Id.*
39. *Id.* at 175–76.

Circuit's decision was cloaked in the required scope of review—the court reasoned that where "'a rational relationship exists between the [policy] and a *conceivable* legitimate governmental objective' . . . there [would be] no substantive due process violation."[40] It is clear from these two cases that, although Texas had enacted a Vested Rights Statute, appellate courts tended to construe those rights narrowly and in favor of regulatory agencies.

Subsequently, the Texas Legislature inadvertently repealed the Vested Rights Statute.[41] However, the legislature acted at the next possible opportunity to correct the error.[42] The legislature found that the inadvertent repeal of the Vested Rights Statute:

> [R]esulted in the reestablishment of administrative and legislative practices that often result in unnecessary governmental regulatory uncertainty that inhibits the economic development of the state and increases the cost of housing and other forms of land development and often resulted in the repeal of previously approved permits causing decreased property and related values, bankruptcies, and failed projects.[43]

Thus, according to the legislature "restoration of requirements relating to the processing and issuance of permits and approvals by local governmental regulatory agencies" under the Vested Rights Statute was necessary "to safeguard the general economy and welfare of the state and to protect property rights."[44] The legislature clearly applied the protections of the reenacted vested rights retroactively to the two-year time period during which the statute had been repealed.[45] This reenactment is now codified in

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40. *Id.* at 174–75 (first alteration in original) (emphasis added) (citations omitted).

41. *See* Sheffield Dev. Co. v. City of Glen Heights, 140 S.W.3d 660, 665 n.5 (Tex. 2004) (recognizing that the Texas Legislature inadvertently repealed the Vested Rights Statute).

42. *Id.*; *see also* Arthur J. Anderson, *Landowner's Approach to Land-Use Litigation*, 32 URB. LAW. 587, 605–06 (2000) (explaining that the statute "was accidentally repealed during the sunset review of the Texas Department of Commerce"); *cf.* Quick v. City of Austin, 7 S.W.3d 109, 125 (Tex. 1998) (noting that after repealing the Vested Rights Statute, the legislature failed to include a savings clause).

43. Act of Apr. 29, 1999, 76th Leg., R.S., ch. 73, § 1, 1999 Tex. Gen. Laws 431, 432 (codified at TEX. LOC. GOV'T CODE ANN. § 245.001–.006 (Vernon 2005)).

44. *Id.*

45. *Id.*; *see also* Arthur J. Anderson, *Landowner's Approach to Land-Use Litigation*, 32 URB. LAW. 587, 606 (2000) (noting that House Bill 1704 obviously exhibited the legislature's intent that the legislation have a retroactive effect).

chapter 245 of the Texas Local Government Code,[46] which is commonly known as the "Vested Rights Act" or "Freeze Statute" law.[47]

II. TEXAS LOCAL GOVERNMENT CODE, CHAPTER 245

Title 7 of the Texas Local Government Code governs the regulation of land use, structures, businesses, and related activities.[48] It is comprised of three subtitles: subtitle A, governing municipal regulatory authority; subtitle B, governing county regulatory authority; and subtitle C, governing regulatory authority applying to more than one type of local government.[49] In 1999, the Texas Legislature enacted Chapter 245 as part of title 7, subtitle C to govern the issuance of local permits.[50]

A. *Applicability of Chapter 245*

Section 245.003 provides that Chapter 245 "applies only to a project in progress on or commenced after September 1, 1997."[51] A project is considered to have been "in progress" if:

> (1) before September 1, 1997:
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> (A) a regulatory agency approved or issued one or more permits for the project; or
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> (B) an application for a permit for the project was filed with a regulatory agency; and
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> (2) on or after September 1, 1997, a regulatory agency enacts, enforces, or otherwise imposes:
>
> (A) an order, regulation, ordinance, or rule that in effect retroactively changes the duration of a permit for the project;
>
> (B) a deadline for obtaining a permit required to continue or complete the project that was not enforced or did not apply to the

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46. *See generally Sheffield*, 140 S.W.3d at 665 n.5 (recognizing that the Texas Legislature inadvertently repealed the Vested Rights Statute and that the statute has been recodified).

47. *See* Alan J. Bojorquez, *Permit Processing: Are You Really Grandfathered?*, 2007 U. OF TEX. LAND USE PLAN. L. CONF. 2 (providing an overview of the regulatory issues of Chapter 245).

48. TEX. LOC. GOV'T CODE ANN. § 211.001–.021 (Vernon 2005).

49. *Id.* §§ 211.001–250.005.

50. *See* Act of Apr. 29, 1999, 76th Leg., R.S., ch. 73, § 2, 1999 Tex. Gen. Laws, 431, 432 (amending subtitle C to include issuance of permits).

51. TEX. LOC. GOV'T CODE ANN. § 245.003 (Vernon 2005).

project before September 1, 1997; or

(C) any requirement for the project that was not applicable to or enforced on the project before September 1, 1997.[52]

However, the statute also provides for certain exemptions; Chapter 245 does not apply to eleven specific scenarios:

(1) a permit that is at least two years old, is issued for the construction of a building or structure intended for human occupancy or habitation, and is issued under laws, ordinances, procedures, rules, or regulations adopting only:

(A) uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization; or

(B) local amendments to those codes enacted solely to address imminent threats of destruction of property or injury to persons;

(2) municipal zoning regulations that do not affect . . . lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality;

(3) regulations that specifically control the only use of land in a municipality that does not have zoning and that do not affect . . . lot size, lot dimensions, lot coverage, or building size;

(4) regulations for sexually oriented businesses;

(5) municipal or county ordinances, rules, regulations, or other requirements affecting colonias;

(6) fees imposed in conjunction with development permits;

(7) regulations for annexation . . . ;

(8) regulations for utility connections;

(9) regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy;

(10) construction standards for public works located on public lands or easements; or

(11) regulations to prevent the imminent destructions of property or injury to persons if the regulations do not:

(A) affect . . . lot size, lot dimensions, lot coverage, building size, residential or commercial density, or the timing of a project; or

(B) change development permitted by a restrictive covenant required by a municipality.[53]

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52. *Id.*

53. *Id.* § 245.004. The legislative history behind the passage of section 245.004(11) includes the passage of Senate Bill 1704 in 1995. Senate Bill 1704 amended chapter 481 of the Texas Government Code (the predecessor of Chapter 245). Act of May 24, 1995, 74th

Certain statutory definitions within Chapter 245 are key to an understanding of the applicability of the chapter. For example, the statute defines "permit" as "a license, certificate, approval, registration, consent, permit, ... or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought."[54] Moreover, "project" is defined as "an endeavor over which a regulatory agency exerts its jurisdiction and for which one or more permits are required to initiate, continue, or complete the endeavor."[55] In addition, the Texas attorney general has opined that rights remain vested under Chapter 245 even if the property is conveyed to a different owner as long as the project is not altered.[56] Further, "regulatory agency" means "the governing body of, or a bureau, department, division, board, commission, or other agency of, a political

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Leg., R.S., ch. 794, § 1, 1995 Tex. Gen. Laws 4147, 4147; *see* Act of Apr. 19, 1999, 76th Leg., R.S., ch. 73, § 3, 1999 Tex. Gen. Laws 431, 434 (delineating the effect of repealed Chapter 481 on projects and permits that Chapter 245 would affect). The bill added exemptions for zoning regulations in certain instances and "regulations [that] prevent imminent destruction of property or injury to persons." Act of May 24, 1995, 74th Leg., R.S., ch. 794, § 1, 1995 Tex. Gen. Laws 4147, 4147–48. The legislative history also included the passage of House Bill 1704 in 1999. Act of Apr. 29, 1999, 76th Leg., R.S., ch. 73, § 2, 1999 Tex. Gen. Laws 431. This legislation reenacted the Vested Rights Statute, which was inadvertently repealed in 1997. As part of House Bill 1704, the exemption for regulations that prevent imminent destruction of property or injury to persons was amended to expressly include flood plain regulations. TEX. LOC. GOV'T CODE ANN. § 245.004 (Vernon 2005).

54. TEX. LOC. GOV'T CODE ANN. § 245.001(1) (Vernon 2005). The Third Court of Appeals (Austin) has held that an application to rezone property is not a permit as defined by Chapter 245; therefore, a city retains broad discretion to rezone property so as "'to entirely prohibit previously permissible uses, even established uses' and ... amend regulations ... in ways that 'affect the prospective development of the property within the broad zoning categories.'" Weatherford v. City of San Marcos, 157 S.W.3d 473, 488–89 (Tex. App.—Austin 2004, pet. denied) (citation omitted); *accord* Williamson Pointe Venture v. City of Austin, 912 S.W.2d 340, 343 (Tex. App.—Austin 1995, no writ) (interpreting former section 481.143 of the Texas Government Code).

55. TEX. LOC. GOV'T CODE ANN. § 245.001(3) (Vernon 2005).

56. Op. Tex. Att'y Gen. No. JC-0425 (2001). In JC-0425, the Texas attorney general was asked to decide whether rights were vested even after the owner at the time the original permit was filed sold the property. *See id.* (examining the rights of a purchaser of real property when the seller filed the first permit application prior to the conveyance). Citing Chapter 245, the attorney general opined that "[n]othing in chapter 245 suggests that the development regulations to which a property is subject, locked in at the time of filing the original application for the first permit, no longer apply to the property solely because the property has been conveyed to another owner." *Id.*

subdivision acting in its capacity of processing, approving, or issuing a permit,"[57] and a "political subdivision" is "a ... subdivision of the state, including a county, a school district, or a municipality."[58]

B. *Chapter 245's Vested Rights*

Essentially, Chapter 245 vests certain rights of owners and developers after an initial permit application is filed. In most circumstances, the statute provides that the rules and regulations in effect at the time the first permit is filed remain applicable to the project even if those rules and regulations are later altered.[59] According to section 245.002 of the statute: "Each regulatory agency shall consider the approval, disapproval, or conditional approval of an application for a permit solely on the basis of any orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time ... the original application for the permit is filed ...."[60] Typically, the first permit is a preliminary subdivision plat.[61]

Therefore, even:

> If a series of permits is required for a project, the orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for

57. TEX. LOC. GOV'T CODE ANN. § 245.001(4) (Vernon 2005).

58. *Id.* § 245.001(2).

59. *See* R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 TEX. TECH L. REV. 955, 970–71 (2001) ("[Chapter 245] generally prevents cities from changing the rules in the middle of the game and provides a degree of certainty for the landowner/developer by locking in the rules for a real estate development.").

60. TEX. LOC. GOV'T CODE ANN. § 245.002(a)(1) (Vernon 2005); *see* Save Our Springs Alliance v. City of Austin, 149 S.W.3d 674, 679 n.1 (Tex. App.—Austin 2004, no pet.) (referring to section 245.002(a)–(b) "as 'the grandfather clause' because [these sections] 'grandfather' plats from local land-use regulations enacted after an original application for development for that plat was filed").

61. *See generally* TEX. LOC. GOV'T CODE ANN. § 212.004 (Vernon 1999) (governing platting requirements for municipalities); *id.* § 232.001 (Vernon 2005) (governing platting requirements for subdivisions). According to section 212.004 (and its counterpart in Chapter 232), a subdivision plat must be recorded in the real property records of the county or counties in which the property is located and must contain certain statutorily required information, including a metes and bounds description and the dimensions of the proposed subdivision. *See id.* §§ 212.004(b)–(e), 232.001(b)–(e) (delineating the requirements for recordation of subdivision plats).

> consideration of all subsequent permits required for the completion of the project.[62]

In so allowing, the statute provides that "[a]ll permits required for [a] project are considered to be a single series of permits."[63] This means that subsequent permits that must be filed after amended regulations have taken affect will not affect vesting.[64] Additionally, "[p]reliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project."[65] Furthermore, "[a]fter an application for a project is filed, a regulatory agency may not shorten the duration of any permit required for [a] project."[66]

This means a developer has the opportunity to take advantage of any changes in rules and regulations without giving up the protections afforded by Chapter 245. According to section 245.002(d):

> Notwithstanding any provision of this chapter to the contrary, a permit holder may take advantage of recorded subdivision plat notes, recorded restrictive covenants required by a regulatory agency, or a change to the laws, rules, regulations, or ordinances of a regulatory agency that enhance or protect the project, including changes that lengthen the effective life of the permit after the date the application for the permit was made, without forfeiting any rights under this chapter.[67]

In *City of Austin v. Garza*,[68] the Third Court of Appeals (Austin) confronted the issue of whether this subsection of Chapter 245 was unconstitutional.[69] The City of Austin sought to enforce an "interim ordinance" that conflicted with a plat note contained in the subdivision plat, which the City Planning

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62. *Id.* § 245.002(b).

63. *Id.*

64. *See* TEX. LOC. GOV'T CODE ANN. § 245.002(b) (Vernon 2005) (establishing that the first permit in a number of mandatory permits will determine which regulations will apply to a project).

65. *Id.*

66. *Id.* § 245.002(c).

67. *Id.* § 245.002(d).

68. City of Austin v. Garza, 124 S.W.3d 867 (Tex. App.—Austin 2003, no pet.).

69. *Id.* at 871–74.

Commission had previously approved.[70] The plat note effectively "allowed [the developer] up to seventy percent impervious cover" for the development—which would occur over the Barton Creek Watershed—whereas the interim ordinance only provided for 18% impervious cover.[71] The developer, relying in part on section 245.002(d), sought a declaratory judgment holding that the plat note governed the development.[72] In contrast, the City of Austin argued that section 245.002(d) unconstitutionally delegated governmental authority to private actors.[73] The court explained that "[a] delegation of legislative powers occurs when a private entity is given the power (1) to make rules, (2) determine public policy, (3) provide the details of the law, (4) promulgate rules and regulations to apply the law, or (5) ascertain conditions upon which existing laws may operate."[74] Because the City of Austin's argument centered around the developer's ability to "cherry-pick" which regulations would apply to the project, it essentially argued that an unconstitutional delegation of power had occurred in that a private entity was allowed to "ascertain conditions upon which existing laws may operate."[75]

The court disagreed, noting that "[i]n effect, paragraph (d) allows a property owner to elect between developing pursuant to the notes within the subdivision plat or pursuant to the regulatory scheme in effect at the time the owner originally filed for a permit."[76] In other words, a developer's ability to cherry-pick the regulations that will apply to a particular project does not unconstitutionally provide the developer with the ability to create laws.[77] This ability to cherry-pick also serves as an expansion of vested rights.

Nevertheless, in certain limited circumstances where there is

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70. *Id.* at 869.

71. *Id.* at 868–69.

72. *Id.* at 870.

73. *Garza*, 124 S.W.3d at 871.

74. *Id.* at 872 n.9 (citing FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 873 (Tex. 2000)).

75. *Id.*

76. *Id.* at 873.

77. City of Austin v. Garza, 124 S.W.3d 867, 873–74 (Tex. App.—Austin 2003, no pet.). As a second basis for affirming the declaratory judgment against the city, the court relied on the doctrine of equitable estoppel because the city was benefiting from its mistake in approving the plat note while simultaneously avoiding its obligations. *Id.* at 874.

insufficient activity on a project within a certain amount of time after the permit is filed, Chapter 245 requires that new rules and regulations apply to projects that would otherwise be protected by the statute.[78] Section 245.005 of the statute relates to "dormant projects" and provides that:

> After the first anniversary of the effective date of this chapter, a regulatory agency may enact an ordinance, rule, or regulation that places an expiration date on a permit if as of the first anniversary of the effective date of this chapter: (i) the permit does not have an expiration date; and (ii) no progress has been made towards completion of the project.[79]

In such circumstances, "[a]ny ordinance, rule, or regulation enacted pursuant to this subsection shall place an expiration date of no earlier than the fifth anniversary of the effective date of this chapter."[80] Here, the statute lists "[p]rogress towards completion of the project" to include scenarios where:

> (1) an application for a final plat or plan is submitted to a regulatory agency; (2) a good-faith attempt is made to file with a regulatory agency an application for a permit necessary to begin or continue towards completion of the project; (3) costs have been incurred for developing the project including, without limitation, costs associated with roadway, utility, and other infrastructure facilities designed to serve, in whole or in part, the project (but exclusive of land acquisition) in the aggregate amount of five percent of the most recent appraised market value of the real property on which the project is located; (4) fiscal security is posted with a regulatory agency to ensure performance of an obligation required by the regulatory agency; (5) or utility connection fees or impact fees for the project have been paid to a regulatory agency.[81]

Accordingly, it is imperative that an owner or developer ensure progress towards completion of the project to maintain vested rights protection.

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78. *See* TEX. LOC. GOV'T CODE ANN. § 245.005 (Vernon 2005) (discussing the limits placed on regulatory agencies when enacting expiration dates pursuant to the authority granted in this chapter).

79. *Id.* § 245.005(a).

80. *Id.*

81. *Id.* § 245.005(c).

C. *The Effect of Moratoria on Vested Rights*

An issue that may be applicable in the analysis of vested rights is the governing authority's ability to enact moratoria on development. Moratoria allow a city to maintain the status quo pending changes to local governing regulations, thereby traditionally preventing an owner's or developer's rights from vesting.[82] Although moratoria are meant to be used only as temporary measures to address health and safety issues arising from new development, municipalities have increasingly used them as a mere "time-out" while addressing other zoning issues—for example, the application of existing zoning regulations.[83]

Moratoria, in this context, are a type of government zoning regulation and, as such, must comply with constitutional safeguards.[84] In the context of moratoria litigation, the primary issue is whether an unconstitutional taking has occurred as a result of the implementation of the moratorium.[85] As the Texas Supreme Court concluded in *Sheffield*, a moratorium may constitute an unconstitutional taking.[86] In *Sheffield*, the City of Glenn Heights placed a fifteen month moratorium on new construction and rezoned property owned by Sheffield to require larger lots than were required when Sheffield acquired the

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82. *See, e.g.*, Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 681 (Tex. 2004) (determining that a chain of vested rights based on a plat filed during a hiatus in the moratorium was ripe); 2218 Bryan St., Ltd. v. City of Dallas, 175 S.W.3d 58, 63–64 (Tex. App.—Dallas 2005, pet. denied) (stating that the imposition of a moratorium on an application for permits to alter or demolish structures did not violate landowners' due process rights).

83. Arthur J. Anderson, *Vested Rights and Investment Backed Expectations*, 2002 ADVANCED REAL EST. L. COURSE 17 (on file with the *St. Mary's Law Journal*).

84. *See Sheffield*, 140 S.W.3d at 679–80 (recognizing that since the petitioner filed a claim stating that a moratorium constituted a taking, and the court ruled on that claim, the court acknowledged that moratoria in this context are categorized as government zoning ordinances and are subject to the same scrutiny). *But see* Schafer v. City of New Orleans, 743 F.3d 1086, 1087 (5th Cir. 1984) (stating that a moratorium on building permits while performing a study of the area was not a zoning ordinance).

85. *See* Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 (2002) ("The question presented is whether a moratorium on development ... constitutes a *per se* taking of property."); *Sheffield*, 140 S.W.3d at 663 (relating that the plaintiff argued "that [a] moratorium ... constituted a taking of its property without adequate compensation").

86. *See Sheffield*, 140 S.W.3d at 679–80 (demonstrating that the court judged the moratorium under the same standard applicable to any government action that is challenged as a taking).

property.[87] Although the *Sheffield* court did not find that the fifteen month moratorium in that case was a taking, it noted that a moratorium could be considered a taking if it did not "substantially advance[ ] legitimate government interests."[88]

Moreover, the Texas Legislature enacted subchapter E of chapter 212 of the Texas Local Government Code, effective September 1, 2003, governing moratoria on residential property development.[89] According to subchapter E, "[a] municipality may not adopt a moratorium on property development unless" (1) a public hearing is held giving "municipal residents and affected parties [the] opportunity to be heard" and (2) "the moratorium is justified by demonstrating a need to prevent a shortage of essential public facilities" evidenced by written findings.[90] Under this subchapter, "essential public facilities" are defined as "water, sewer, or storm drainage facilities or street improvements provided by a municipality or private utility."[91] Subchapter E goes on to provide that a moratorium may not be extended beyond 120 days without a public hearing and further written findings,[92] and "[a] moratorium adopted under this subchapter does not affect the rights acquired under Chapter 245 or common law."[93] Thus, at least with regard to residential development, a municipality may no longer use moratoria to skirt an owner's or developer's vested rights.

D. *Enforcing Vested Rights*

1. Statutory Enforcement

Section 245.006(a) provides: "This chapter may be enforced only through mandamus or declaratory or injunctive relief."[94] Thus, an owner or developer has the ability to file suit to have the court

87. *Id.* at 664–66.
88. *Id.* at 679–80.
89. TEX. LOC. GOV'T CODE ANN. § 212.131–.139 (Vernon Supp. 2006).
90. *Id.* § 212.133–.135.
91. *Id.* § 212.131(1).
92. *Id.* § 212.136.
93. *Id.* § 212.138.
94. TEX. LOC. GOV'T CODE ANN. § 245.006(a) (Vernon 2005); *see also* Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.001–.011 (Vernon 1997) (addressing declaratory judgments).

declare his rights vested under Chapter 245, including the ability to obtain extraordinary relief in an injunctive action. Importantly, the section also waives the government's ability to claim sovereign immunity from suit.[95] Ultimately, however, the parties involved (namely, the municipality and the owner or developer) may find that the best enforcement is reached through agreement rather than litigation.[96]

2. Enforcement Based on Unconstitutional Taking

Relief may also be available under a claim that the governmental regulation constitutes an unconstitutional taking.[97] The

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95. TEX. LOC. GOV'T CODE ANN. § 245.006(b) (Vernon 2005). If the Texas Legislature had not expressly waived the government's ability to claim immunity from suit, well-settled rules of law precluding suit based upon the application of sovereign immunity would be implicated so as to preclude relief for a landowner or developer attempting to enforce their vested rights. *See generally* Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 853 (Tex. 2002) (quoting Gen. Servs. Comm'n v. Little-Tex Insul. Co., 39 S.W.3d 591, 594 (Tex. 2001)) ("Sovereign immunity encompasses two principles: immunity from suit and immunity from liability."); DeSoto Wildwood Dev. Inc. v. City of Lewisville, 184 S.W.3d 814, 824 (Tex. App.—Fort Worth 2006, no pet.) (citing Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540, 542 (Tex. 2003)) ("Sovereign immunity defeats a court's subject matter jurisdiction . . . [; therefore,] [i]n a suit against a governmental unit, the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity."). The *IT-Davy* court observed: "Immunity from suit bars a suit against the State unless the Legislature expressly consents to the suit." *IT-Davy*, 74 S.W.3d at 853 (citing *Little-Tex*, 39 S.W.3d at 594); *see also* Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997), *superseded by statute*, TEX. GOV'T CODE ANN. § 2260.001–.108 (Vernon 2000) (noting that the legislature must waive sovereign immunity); Knowles v. City of Granbury, 953 S.W.2d 19, 23 (Tex. App.—Fort Worth 1997, pet. denied) (stating that the legislature must provide waiver of immunity from suit). Therefore, if there is no express waiver of immunity, the state retains immunity from suit even if waiver of immunity from liability has been established. *Fed. Sign*, 951 S.W.2d at 405 (citing Mo. Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970), *overruled by* Tooke v. City of Mexia, 197 S.W.3d 325, 347 (Tex. 2006)). Immunity from liability also protects the state against money judgments even if waiver of immunity from suit has been established. *IT-Davy*, 74 S.W.3d at 853 (citing *Little-Tex*, 39 S.W.3d at 594).

96. *See* Alan J. Bojoquez, *Permit Processing: Are You Really Grandfathered?*, 2007 U. OF TEX. LAND USE PLAN. L. CONF. 4 ("Some cities use Development Agreements, Planned Development Districts (aka, Planned Unit Developments), or Conditional Overlays to negotiate a *win-win* situation and avoid litigation." (footnote omitted)) (on file with the *St. Mary's Law Journal*).

97. *See* Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 669–72 (Tex. 2004) (discussing the notion that a regulation can amount to an unconstitutional taking); Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 933 (Tex. 1998) (reiterating that a taking may be in the form of a regulation).

Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."[98] Similarly, article I, section 17 of the Texas Constitution provides, in pertinent part, that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made."[99]

There are two classifications of takings: physical and regulatory.[100] "Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property."[101] A regulatory taking occurs "if [an] ordinance . . . denies an owner all 'economically viable use of his land.'"[102] "A restriction denies the owner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless."[103] To determine whether a governmental regulation has interfered with the right of an owner "to use and enjoy property" one must examine the regulation's economic impact and the regulation's level of interference with the investor's expectations.[104] One determines the regulation's economic impact by weighing "the value . . . taken from the property [against] the value that remains in the property."[105] This evaluation, however, does not account for "[t]he loss of anticipated gains or potential future profits."[106] Under the second factor, investment-backed expectation, "[t]he existing and permitted uses of the property constitute the 'primary expectation' of the owner that is affected by regulation."[107] With regard to whether zoning constitutes an unconstitutional taking, "[k]nowledge of existing zoning is to be considered in determining whether the regulation interferes with investment-backed expectations."[108]

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98. U.S. CONST. amend. V.
99. TEX. CONST. art I, § 17.
100. *Mayhew*, 964 S.W.2d at 933.
101. *Id.*
102. *Id.* (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).
103. *Id.*
104. *Id.* at 935–36.
105. *Mayhew*, 964 S.W.2d at 935–36 (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987)).
106. *Id.* at 936 (citing Andrus v. Allard, 444 U.S. 51, 66 (1979)).
107. *Id.*
108. *Id.*

In *Mayhew v. Town of Sunnyvale*[109]—the seminal Texas Supreme Court decision on the issue—the existing zoning regulations were not an unconstitutional taking.[110] Because the takings claim involved a constitutional issue, the court's analysis was obviously framed in light of the federal and state protections requiring just compensation.[111] A regulatory taking[112] is constitutional if it "substantially advance[s] a legitimate governmental interest."[113] Additionally, it must not deny the owner "all economically viable use of their property, or ... unreasonably interfere with" the owner's use and enjoyment of the property without just compensation.[114] In *Mayhew*, the court held that denial of the planned development was not unconstitutional because (1) the town advanced a legitimate government interest in "protecting the community from the ill effects of urbanization,"[115] (2) the property's value was not completely destroyed, and (3) although the relevant zoning was not in place at the time of purchase, the Mayhews' historical use of the property for farming and ranching rather than for development prevented a reasonable investment-backed expectation.[116]

Another situation in which local actions may result in a taking is the implementation of a city's moratorium on development. [117] The Fifth Court of Appeals at Dallas, in *City of Glenn Heights v.*

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109. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998).

110. *Id.* at 938 (holding that the town's actions did not constitute an unconstitutional taking). The court also addressed whether the issue was ripe, explaining that "in order for a regulatory takings claim to be ripe, there must be a final decision regarding the application of the regulations to the property at issue." *Id.* at 929. Moreover, the court explained that "a final decision on the application of the zoning ordinance to the plaintiff's property is not required if the plaintiff brings a facial challenge to the ordinance." *Id.* at 930. Ultimately, the court concluded that the issue was ripe. *Id.* at 932.

111. *Mayhew*, 964 S.W.2d at 933 (quoting the Just Compensation Clause of the Fifth Amendment to the United States Constitution and its counterpart in the Texas Constitution).

112. *See, e.g., id.* (alleging that the town's actions were a regulatory taking). "Takings can be classified as either physical or regulatory takings. Physical takings occur when the government authorizes an unwarranted physical occupation of an individual's property." *Id.*

113. *Id.* at 933.

114. *Id.* at 935.

115. Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935 (Tex. 1998).

116. *Id.* at 937.

117. *See* Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 671 (Tex. 2004) (explaining that government regulations can operate as compensable takings).

Sheffield Development Co. (Sheffield II),[118] addressed whether the developer could recover both a takings compensation and injunctive relief.[119] Sheffield purchased approximately 194 acres of property for residential development; when the city rezoned, Sheffield sued.[120] Initially, the city zoned the property to allow for single-family residential uses consisting primarily of 6,500 square foot lots.[121] However, after Sheffield purchased the property, the city amended the ordinance to require minimum 12,000 square foot lots.[122] Additionally, the city "enacted a moratorium on the approval of development applications" to eliminate the possibility that owners and developers like Sheffield would lock-in their rights under the old ordinance.[123]

In *Sheffield I*,[124] the trial court concluded that an unconstitutional taking had occurred because of the rezoning—not because of the moratorium—and awarded damages to Sheffield.[125] On appeal, the Tenth Court of Appeals at Waco (*Sheffield III*) affirmed the trial court's judgment regarding the rezoning but reversed and rendered as to the moratorium. The court also reversed and remanded Sheffield's declaratory judgment action.[126] The Texas Supreme Court, however, reversed on the takings claims but affirmed the remand.[127] In *Sheffield II*,[128] the Fifth Court of Appeals at Dallas concluded that Sheffield was barred from declaratory and injunctive relief under Chapter 245 because it had elected to proceed to judgment on damages in *Sheffield I*.[129]

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118. City of Glenn Heights v. Sheffield Dev. Co. (*Sheffield II*), 55 S.W.3d 158 (Tex. App.—Dallas 2001, pet. denied).

119. *Id.* at 165 (identifying the issue and holding the remedies to be inconsistent).

120. *Id.* at 160–61.

121. *Id.*

122. *Id.* at 161.

123. City of Glenn Heights v. Sheffield Dev. Co. (*Sheffield III*), 61 S.W.3d 634, 640 (Tex. App.—Waco 2001), *aff'd in part, rev'd in part,* 140 S.W.3d 660 (Tex. 2004).

124. *See Sheffield II*, 55 S.W.3d at 161 (designating the underlying controversy tried to the 40th Judicial District Court in Ellis County as *"Sheffield I"*). *Sheffield I* was appealed to the Tenth Court of Appeals at Waco (*Sheffield III*). *Sheffield III*, 61 S.W.3d at 639.

125. *Sheffield III*, 61 S.W.3d at 641.

126. *Id.* at 659–60.

127. Sheffield Dev. Co. v. City of Glenn Heights, 140 S.W.3d 660, 681 (Tex. 2004).

128. *See generally Sheffield II*, 55 S.W.3d at 161–62 (acknowledging the case on appeal in Waco (herein *Sheffield III*)).

129. *Id.* at 168.

3. Election of Remedies

Unlike the relief provided under Chapter 245, a regulatory takings claim under *Mayhew* may provide for an award of damages. However, where both types of actions are available and the owner or developer is awarded damages, an appellate court would likely preclude Chapter 245's injunctive or declaratory relief.[130]

> An election of remedies is the act of choosing between two or more inconsistent but coexistent modes of procedure and relief allowed by law on the same state of facts. When a party thus chooses to exercise one of them he abandons his right to exercise the other remedy and is precluded from resorting to it.[131]

The Texas Supreme Court has interpreted an election of remedies to "bar . . . relief when (1) one successfully exercises an informed choice (2) between two or more remedies, rights, or states of facts (3) which are so inconsistent as to (4) constitute manifest injustice."[132]

4. Appeal

On appeal from a declaratory judgment, the appellate court's standard of review is the same as that for any other judgment or decree.[133] Accordingly, "[t]he trial court's conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence."[134] In other words, if at least one of the theories underlying the trial court's legal determination is valid, the judgment will be affirmed.[135] In determining whether

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130. *See id.* ("Because [a judgment for permanent damages] is inconsistent with obtaining declaratory and injunctive relief from the application of [Chapter 245], Sheffield's claims in this case are barred by the election of remedies doctrine.").

131. *Id.* at 164 (quoting Custom Leasing, Inc. v. Tex. Bank & Trust Co., 491 S.W.2d 869, 871 (Tex. 1973)).

132. Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848, 851 (Tex. 1980).

133. City of Austin v. Garza, 124 S.W.3d 867, 871 (Tex. App.—Austin 2003, no pet.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 37.010 (Vernon 1997) (current version unchanged)).

134. *Id.*

135. *Id.*; *accord* Westech Eng'g, Inc. v. Clearwater Constructors, Inc., 835 S.W.2d 190, 196 (Tex. App.—Austin 1992, no writ) ("Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence.").

an unconstitutional taking has occurred, an appellate court conducts a de novo review; whether a compensable taking has occurred is a question of law.[136] This is so despite the numerous factual determinations that must be made in any takings case.[137]

III. RECENT LEGISLATIVE AMENDMENTS TO CHAPTER 245

On April 27, 2005, the Texas Legislature enacted Senate Bill 848, which approved several changes to Chapter 245.[138] Because the bill received the requisite two-thirds vote in each house, it became effective immediately.[139] By implementing changes to Chapter 245, the Texas Legislature expanded the application of vested rights.

Senate Bill 848 made two primary changes to Chapter 245 by modifying sections 245.001 and 245.002.[140] First, the bill expanded the definition of permit contained in section 245.001.[141] Now, a "permit" is defined as:

> a license, certificate, approval, registration, consent, permit, *contract or other agreement for construction related to, or provision of, service from a water or wastewater utility owned, operated, or controlled by a regulatory agency*, or other form of authorization required by law, rule, regulation, order, or ordinance that a person must obtain to perform an action or initiate, continue, or complete a project for which the permit is sought.[142]

Thus, the definition incorporates additional contracts or agreements related to water and wastewater, expanding the point at which rights vest if such agreements are required by the regulatory agency.

Next, the bill substantially expanded section 245.002 as it relates

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136. *See, e.g.*, Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 932–33 (Tex. 1998) (outlining the standard of review).

137. *Id.*

138. TEX. LOC. GOV'T CODE ANN. § 245.001–.002 historical notes (Vernon 2005) [Act of Apr. 25, 2005, 79th Leg., R.S., ch. 6, 2005 Tex. Gen. Laws 5–6].

139. Act of Apr. 25, 2005, 79th Leg., R.S., ch. 6, § 4, 2005 Tex. Gen. Laws 5, 6. On April 13, 2005, the Senate voted 27-3 in favor of passage and concurred in the house amendments twelve days later by a vote of 29-1. *Id.* The bill, as amended, passed the house by a vote of 118-20 on April 21, 2005. *Id.*

140. *Id.* §§ 1, 2.

141. TEX. LOC. GOV'T CODE ANN. § 245.001(1) (Vernon 2005).

142. *Id.* (emphasis added).

to vested rights that apply to the duration of the project. Previously, owners and developers could rely only upon the rules, regulations, ordinances, and the like "in effect at the time the original application for the permit [wa]s filed."[143] Now, vested rights include those rules "in effect at the time: (1) the original application for permit is filed for review for any purpose, including review for administrative completeness ... or (2) a plan for development of real property or plat application is filed with the regulatory agency."[144]

During debate over the bill, Representative Rodriguez asked Representative Kuempel (the bill's sponsor) whether the "bill require[d] a city to lock in grandfathering based on a prior approval from another regulatory agency, such as an approval of a water well, on-site sewage facility, or ... curb cut[s]."[145] The answer was no.[146] Accordingly, the legislative history supports the proposition that rights vest under Chapter 245 only with regard to the municipality's approval, but requirements of other agencies as a prerequisite to the application of Chapter 245 do not vest rights.[147]

Relatedly, section 245.002 has been substantively amended to provide that:

> Rights to which a permit applicant is entitled under this chapter accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency fair notice of the project and the nature of the permit sought. An application or plan is considered filed on the date the applicant delivers the application or plan to the regulatory agency or deposits the application or plan with the United States Postal Service by certified mail addressed to the regulatory agency. A certified mail receipt obtained by the applicant at the time of deposit is prima facie evidence of the date the application or plan was deposited with the United States Postal Service.[148]

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143. Act of Apr. 29, 1999, 76th Leg., R.S., ch. 73, § 2, 1999 Tex. Gen. Laws 431, 432 (amended 2005) (current version at TEX. LOC. GOV'T CODE ANN. § 245.002(a) (Vernon 2005)).

144. TEX. LOC. GOV'T CODE ANN. § 245.002(a) (Vernon 2005).

145. H.J. of Tex., 79th Leg., R.S. 2057 (2005).

146. *Id.*

147. *Id.* at 2042 (stating the intention that "vested rights expire when an incomplete application expires").

148. Act of Apr. 25, 2005, 79th Leg., R.S., ch 6, § 2, 2005 Tex. Gen. Laws 6 (current

Importantly, this new provision effectively defines the filing date upon which rights vest as the date "fair notice" is given to the regulatory agency.[149] This provision goes hand-in-hand with the expanded definition of when rights vest as the point at which an application "is filed for review for any purpose."[150] Moreover, this provision prevents (at least subject to an added forty-five day expiration provision, discussed below) the agency from declaring that rights have not been vested due to technical deficiencies in the original permit application. Of course, the exact meaning of "fair notice" will likely be an issue of contention, with agencies seeking to define the term in order to eliminate subjective application of the rule.[151]

The addition of a certified mail date as proof of application filing further establishes the point at which rights vest.[152] This might be particularly important if an owner or developer is aware that the city council may be considering regulatory changes because it would allow the owner or developer to deposit an application in the mail, making it possible to vest rights on the eve of such changes. The key here is that the certified mail receipt

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version at TEX. LOC. GOV'T CODE ANN. § 245.002(a-1) (Vernon 2005)).

149. *See* H.J. of Tex., 79th Leg., R.S. 2038–40 (2005) (debating when the rules that the city and developer must abide by are established).

150. TEX. LOC. GOV'T CODE ANN. § 245.002(a)(1) (Vernon 2005).

151. *See* Letter and related documents from Sheila Rainosek, Div. Manager, Land Use Review, Watershed Prot. & Dev. Review Dep't, City of Austin, to Stakeholders, Engineers, Applicants and Developers (June 22, 2005) (acknowledging the City of Austin's enactment of an emergency regulation to define "fair notice") (on file with the *St. Mary's Law Journal*). In fact, Representative Kuempel has recently proposed an amendment to section 245.002(a-1) that deletes the word "fair" and adds specific requirements for the notice. Tex. H.B. 3604, 80th Leg., R.S. (2007), *available at* http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/HB03604I.pdf. According to the proposed amendment:

> To give notice, the applicant shall provide to the regulatory agency a written summary describing the project and the land encompassed within the project, including only the following: the nature of the permit sought; a depiction of existing and proposed buildings and their location; number of acres or square feet; existing and proposed zoning and uses; tax parcel numbers; existing or pending zoning cases, restrictive covenants or site plans; name, address and telephone number of owner or owner's agent; whether the project is adjacent to or has access to a principal roadway; legal description of the project; scope and nature of the project; and rules and regulations the applicant seeks to apply to the project.

Id.

152. TEX. LOC. GOV'T CODE ANN. § 245.002(a-1) (Vernon 2005).

establishes prima facie proof of the application's filing date.[153]

Section 245.002 now provides substantive rules governing a regulatory agency's ability to set the expiration date for an original permit application. According to subsection (e),

> A regulatory agency may provide that a permit application expires on or after the 45th day after the date the application is filed if:
> (1) the applicant fails to provide documents or other information necessary to comply with the agency's technical requirements relating to the form and content of the permit application;
> (2) the agency provides to the applicant not later than the 10th business day after the date the application is filed written notice of the failure that specifies the necessary documents or other information and the date the application will expire if the documents or other information is not provided; and
> (3) the applicant fails to provide the specified documents or other information within the time provided in the notice.[154]

And, in this regard, the amended provisions of the vested rights statute expressly provide that "[t]his chapter does not prohibit a regulatory agency from requiring compliance with technical requirements relating to the form and content of an application in effect at the time the application was filed even though the application is filed after the date an applicant accrues rights under [s]ubsection (a-1)."[155]

In other words, the enhanced protections of the amendment do not diminish the regulatory agency's power to require technical compliance with its applications—limited, of course, by the forty-five day provisions discussed above. Finally, Senate Bill 848's amendments "apply only to a project commenced on or after the effective date of th[e] Act."[156] Hence, the expanded vested rights protections apply to an initial permit or application filed after April 27, 2005.[157]

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153. *Id.*
154. *Id.* § 245.002(e).
155. *Id.* § 245.002(f).
156. *Id.* § 245.002(g).
157. *See* Act of Apr. 25, 2005, 79th Leg., R.S., ch. 6, § 4, 2005 Tex. Gen. Laws 6 (current version at TEX. LOC. GOV'T CODE ANN. § 245.002 (Vernon 2005)) (declaring the Act's effective date).

IV. THE CURRENT STATUS OF VESTED RIGHTS

With the historical perspective and current law shedding some light on the expanding nature of vested rights, there are still numerous issues that arise for the average owner or developer. For example, does the master plan for a development qualify as the original permit that will vest rights? Or, if there are no drainage ordinances in existence at the time a master plan is filed and later such ordinances are enacted, must the owner or developer comply? At times, a plain reading of the statute fails to provide a clear answer on whether rights vest in certain situations. A careful analysis can shed some light on these commonly encountered issues. However, the answer to any specific question will depend on the facts and circumstances surrounding each case.

A. *Master Plan as First Permit*

Generally, the first application filed for subdivision development within a municipality is the application for a master plan. When the master plan application is filed, the municipality will seek information such as the identity of the subdivider, the identity of the surveyor or engineer, whether any variance requests are anticipated, the zoning classification, and information related to the proposed use of the project. Under the plain language of Chapter 245, such a master plan application would give the requisite "fair notice" as contemplated by the statute.[158] This interpretation is in accord with the fact that "[p]reliminary plans and related subdivision plats, site plans, and all other development permits for land covered by the preliminary plans or subdivision plats are considered collectively to be one series of permits for a project." There does not appear to be any authority otherwise upon which a municipality could rely to claim that rights do not vest on the filing of the master plan application, particularly given the broad definition of permit under the vested rights statute.[159]

Senate Bill 848's expansion of section 245.002 to include vesting

158. *See* TEX. LOC. GOV'T CODE ANN. § 245.002(a-1) (Vernon 2005) (stating that rights accrue to the applicant upon filing a development plan that informs of the project and permit involved).

159. *See id.* § 245.001(1) (defining permit to include "approval . . . that a person must obtain to . . . initiate . . . a project for which the permit is sought").

upon the filing of the first permit—at which time the municipality would be deemed to have "fair notice" of the project—protects vesting at the moment an application for a master plan is submitted.[160] Even if the municipality chooses to specifically define "fair notice," it may not contradict the plain language of the statute. Moreover, it is clear that regardless of how the municipality defines the term, notice is presumed even if the application does not meet the municipality's technical application requirements—at least for forty-five days after the date of filing.[161]

B. *Drainage Rules as Vested Rights*

Some of the same concerns are relevant in determining whether a municipality's rules governing drainage would affect when rights vest under the statute. For example, several of Chapter 245's specific exemptions could apply.[162] These exemptions, however,

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160. *See* Act of Apr. 27, 2005, 79th Leg., R.S., ch. 6, § 2, 2005 Tex. Gen. Laws 6 (current version at TEX. LOC. GOV'T CODE ANN. § 245.002(a-1) (Vernon 2005)) (adding section 245.002(a-1)).

161. *See* TEX. LOC. GOV'T CODE ANN. § 245.002(e) (Vernon 2005) (allowing for the expiration of a technically incomplete application, but only after forty-five days and under specified conditions).

162. TEX. LOC. GOV'T CODE ANN. § 245.004(2), (3), (6), (8), (9), (11) (Vernon 2005). As mentioned in Part IIA, this section exempts:

> (2) municipal zoning regulations that do not affect . . . lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality;
> (3) regulations that specifically control the use of land in a municipality that does not have zoning and that do not affect . . . lot size, lot dimensions, lot coverage, or building size;
> . . . .
> (6) fees imposed in conjunction with development permits;
> . . . .
> (8) regulations for utility connections;
> (9) regulations to prevent imminent destruction of property or injury to persons from flooding that are effective only within a flood plain established by a federal flood control program and enacted to prevent the flooding of buildings intended for public occupancy;
> . . . .
> (11) regulations to prevent the imminent destruction of property or injury to persons if the regulations do not:
> (A) affect . . . lot size, lot dimensions, lot coverage, building size, residential or commercial density, or the timing of a project; or

are relevant to the question of vesting only if they affect the issue of drainage within the new development. There are no Texas cases directly addressing the application of any of such exemptions. Moreover, application of any individual exemption often requires terms within the exemption to be defined when they are not otherwise defined in the statute.[163] And as clearly addressed in section 245.004, the municipality's ability to amend zoning is not completely affected by the vested rights statute.[164] Therefore, to the extent drainage rules are governed by one of the express exemptions under section 245.004, the owner's or developer's rights would not be vested, requiring the owner or developer to comply with the changed rules. On the other hand, if drainage rules affect issues such as landscaping, lot size or dimensions, or development allowed by municipality mandated restrictive covenants, then the guidelines applicable to drainage at the time the master plan is filed will vest for the entire development project.[165]

Furthermore, if the particular development at issue is outside the municipality's corporate limits, then vesting may be affected by

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(B) change development permitted by a restrictive covenant required by a municipality.

Id.

163. For example, Chapter 245 does not define the terms "imminent" or "destruction" as used in section 245.004(11). *See id.* § 245.001 (defining certain terms used in Chapter 245). Generally, "imminent" means "[a]bout to occur; impending," AMERICAN HERITAGE DICTIONARY 877 (4th ed. 2006), and "destruction" means "[t]he act of destroying." *Id.* at 493. In the event that an owner or developer and the regulatory agency disagree over the meaning of such terms, the dispute will likely end up in court.

164. *See* TEX. LOC. GOV'T CODE ANN. § 245.004(2) (Vernon 2005) (exempting zoning regulations that do not impact specified issues). *Texas Jurisprudence* defines zoning in section 6:

> The division of a city or area into districts and the prescription and application of different regulations in each district is generally referred to as zoning. A comprehensive zoning ordinance necessarily divides the city into certain districts, and prescribes regulations for each one having to do with the architectural design of structures, the area to be occupied by them, and the use to which the property may be devoted. . . .
>
> . . . .
>
> The governing body of a municipality may also adopt, amend, repeal, or change a zoning regulation or boundary; an amendatory zoning ordinance is presumed to be valid.

10 TEX. JUR. 3D *Building Regulations* § 6 (2006) (footnotes omitted).

165. *See* TEX. LOC. GOV'T CODE ANN. § 245.004(2) (Vernon 2005) (stating the Chapter does not apply if zoning regulations do not affect these issues).

a development agreement, if one is entered into between the owner or developer and the municipality.[166] For example, the city and the owner or developer may agree on terms that are different from the rules in effect at the time the first permit is filed.[167] In this situation, the owner or developer would effectively be exercising his right to rely on changes in governing regulations, as is his right under section 245.002(d) of the vested rights statute.[168]

In *Save Our Springs Alliance v. City of Austin*,[169] the Austin Court of Appeals disapproved of the Alliance's argument that the developer could not rely on regulations agreed upon in a development contract because Chapter 245 would have otherwise disallowed the proposed plans.[170] The city had entered into an agreement with the developer concerning development rights and the way in which development-related permits and applications would be reviewed.[171] The City of Austin later officially adopted the agreement.[172] According to the Court of Appeals, "[b]ecause the development agreement amended the Ordinance, [the developer] is entitled to rely on that change to the Ordinance in requesting development permits."[173]

C. *Vested Rights and Impact Fee Requirements*

Another issue is whether impact fees required at the time the initial permit is filed will vest so that the owner or developer need not comply with subsequent changes to existing fees or the implementation of new impact fees.[174] Chapter 395 of the Texas

166. R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 TEX. TECH L. REV. 955, 955–56 (2001) (explaining the benefits of development agreements).

167. *See* Save Our Springs Alliance v. City of Austin, 149 S.W.3d 674, 682 (Tex. App.—Austin 2004, no pet.) (explaining that a development agreement may be enacted as an amendment to already applicable development rules).

168. *See id.* (citing TEX. LOC. GOV'T CODE ANN. § 245.002(d) (Vernon Supp. 2004) (current version unchanged)) ("Because the development agreement amended the [City of Austin's Save our Springs] Ordinance, Stratus is entitled to rely on that change to the Ordinance in requesting development permits.").

169. Save Our Springs Alliance v. City of Austin, 149 S.W.3d 674 (Tex. App.—Austin 2004, no pet.).

170. *Id.* at 681–82.

171. *Id.* at 679.

172. *Id.*

173. *Id.* at 682.

174. *See generally* Ronald H. Rosenberg, *The Changing Culture of American Land*

Local Government Code governs a municipality's ability to implement impact fees.[175] According to section 395.001, an impact fee is:

> [A] charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development. The term includes amortized charges, lump-sum charges, capital recovery fees, [and] contributions in aid of construction . . . .[176]

Furthermore, capital improvement, as defined by the statute, includes "water supply, treatment, and distribution facilities; wastewater collection and treatment facilities; and storm water, drainage, and flood control facilities."[177] The statute also requires that "facilities . . . have a life expectancy of three or more years and are owned and operated by or on behalf of a political subdivision."[178] However, an impact fee is not a fee for the "dedication of rights-of-way or easements or construction or dedication of on-site or off-site water distribution, wastewater collection or drainage facilities, or streets, sidewalks, or curbs if the dedication or construction is required by a valid ordinance and is necessitated by and attributable to the new development."[179]

Section 395.011 expressly authorizes a city to enact or impose impact fees as long as those fees comply with the requirements of Chapter 395.[180] Additionally, "[a] municipality may contract to provide capital improvements, except roadway facilities, to an area outside its corporate boundaries and extraterritorial jurisdiction and may charge an impact fee under the contract."[181] Because "[a]n impact fee may be imposed only to pay the costs of constructing capital improvements or facility expansions,"[182] any fee imposed under the guise of an impact fee that does not go

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Use Regulation: Paying for Growth with Impact Fees, 59 SMU L. REV. 177, 254 (2006) (noting that impact fees are levied not only in Texas but throughout the nation and that the question of vested rights is but one of many issues in play).

175. TEX. LOC. GOV'T CODE ANN. § 395.011(b) (Vernon 2005).
176. *Id.* § 395.001(4).
177. *Id.* § 395.001(1)(A).
178. *Id.* § 395.001(1).
179. *Id.* § 395.001(4)(B).
180. TEX. LOC. GOV'T CODE ANN. § 395.011(b) (Vernon 2005).
181. *Id.* § 395.011(c).
182. *Id.* § 395.012(a).

toward these specific costs would be invalid under Chapter 395.[183]

Based on the language of section 245.002(a), it appears that an owner's or developer's right to pay only those impact fees in existence at the time the master plan is filed may be vested.[184] There is no question as to the importance of vesting impact fees, particularly given the often changing nature of capital improvements and facilities expansion in new development. Nevertheless, Chapter 395 provides that:

> [T]he political subdivision may assess the impact fees at any time during the development and building process and may collect the fees at either the time of recordation of the subdivision plat or connection to the political subdivision's water or sewer system or at the time the political subdivision issues either the building permit or the certificate of occupancy.[185]

Assessment is defined as "a determination of the amount of the impact fee in effect on the date or occurrence provided in" section 395.016.[186] There are no cases interpreting these subsections; however, it appears that when read in conjunction with the grandfather clause of Chapter 245, a municipality would only be able to charge an owner or developer those impact fees effective on the date the master plan is filed, although the amount of the fees may be collected later in the development process.

Of course, neither the impact fee statute nor the vested rights statute addresses the hypothetical situation in which a municipality discovers that a new impact fee is necessary such as when a specific aspect of the new development actually creates the need for a capital improvement or facility expansion that would not have been necessary or even contemplated *but for* the new development.[187] In this case, application of Chapter 395 may lead to the

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183. *See* Black v. City of Killeen, 78 S.W.3d 686, 697 (Tex. App.—Austin 2002, pet. denied) (explaining that an impact fee must comply with Chapter 395 to be valid).

184. TEX. LOC. GOV'T CODE ANN. § 245.002(a) (Vernon 2005); *cf.* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 254 & n.335 (2006) (citing MBL Assocs. v. City of S. Burlington, 776 A.2d 432, 433, 436 (Vt. 2001) and Bohemia Mill Pond v. New Castle Co. Planning Bd., No. 01A-03-007 HLA, 2001 WL 1221685, at *12 (Del. Super. Ct. Oct. 1, 2001)). *But see* TEX. LOC. GOV'T CODE ANN. § 245.004(6) (Vernon 2005) (exempting "fees imposed in conjunction with development permits").

185. TEX. LOC. GOV'T CODE ANN. § 395.016(e) (Vernon 2005).

186. *Id.* § 395.016(f).

187. *But see id.* § 395.017 (prohibiting additional or increased impact fees "for any

conclusion that such an impact fee would be appropriately charged to the owner or developer regardless of Chapter 245.[188] However, should the municipality enact changes to a capital improvement plan that would be more beneficial to the owner or developer, the owner or developer may take advantage of those changes under the vested rights statute.[189] Further, as with drainage issues, to the extent an impact fee qualifies as an exemption under section 245.004, the owner's or developer's right to pay only those fees effective at the time the initial permit is filed would not be vested.[190] Moreover, any development agreement entered into between the city and the owner or developer could likewise impact the application of the vested rights statute to the payment of impact fees.[191]

D. *Vested Rights and Streets, Curb-Cuts, and Road Standards*

Pursuant to its regulatory authority, a municipality may require that a certain portion of development property be dedicated for street purposes.[192] As long as the requirement does not affect "lot size, lot dimensions, lot coverage, or building size," it appears vested rights under Chapter 245 would not be affected.[193] Thus, a municipality could require street dedications as part of the platting process, but the required dedications would not otherwise affect the vested rights of owners and developers.

Moreover, such dedications may be considered a form of

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reason unless the number of service units to be developed on the tract increases" and then limiting such fees).

188. *See id.* § 395.016(e) (allowing assessment of "impact fees at any time during the development and building process"). Note that subsection (e) applies to unplatted developments; platted developments are addressed elsewhere in the statute. *Id.* § 395.016(a)–(d).

189. TEX. LOC. GOV'T CODE ANN. § 245.002(d) (Vernon 2005); *see also* City of Austin v. Garza, 124 S.W.3d 867, 872–73 (Tex. App.—Austin 2003, no pet.) (discussing the effect of section 245.002(d)).

190. *See* TEX. LOC. GOV'T CODE ANN. § 245.004(6) (Vernon 2005) ("This chapter does not apply to: . . . fees imposed in conjunction with development permits . . . .").

191. R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 TEX. TECH L. REV. 955, 955–56 (2001).

192. *See* City of Corpus Christi v. Unitarian Church of Corpus Christi, 436 S.W.2d 923, 930 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.) (stating that a city may require street dedication "by statute and charter and/or ordinance").

193. *See* TEX. LOC. GOV'T CODE ANN. § 245.002(2), (3), (11) (Vernon 2005) (exempting regulations that do not affect these issues).

regulatory taking. In *City of Corpus Christi v. Unitarian Church of Corpus Christi*,[194] the court of appeals concluded that the city could not require a non-subdividing property owner to make a dedication for street purposes even though it had the authority to do so with respect to owners seeking to subdivide their property.[195] Similar to other takings cases, whether a required dedication is unconstitutional depends upon the government's stated interest in requiring the dedication. In other words, there must be a legitimate government interest, and absent such an interest, the dedication results in an unconstitutional taking.

E. *Public Opinion*

The battle for public opinion can also affect the owner's or developer's ability to assert its vested rights. The *San Antonio Express-News* conducted a year long investigation into abuses of the statute.[196] The paper accused developers of a wide variety of inappropriate actions, including "bulldoz[ing] wide swaths of the Hill Country, wiping out hundreds of acres of trees that residents fought hard to protect[,] ... avoid[ing] a 1995 [City of San Antonio] ordinance intended to protect the Edwards Aquifer[,] ... [and] exempt[ing] themselves from at least $2.3 million in drainage fees."[197] According to the column, all of this was done "in the name of vested rights."[198] However, the Texas Legislature has granted owners and developers these rights. [199]

V. CONCLUSION

Although the current state of vested rights in Texas provides more protection for owners and developers than ever before, there are many circumstances under which application of the law is unclear. Nevertheless, in most circumstances, an owner's or

194. City of Corpus Christi v. Unitarian Church of Corpus Christi, 436 S.W.2d 923 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.).

195. *Id.* at 929–30.

196. John Tedesco, *Law Lets Developers Ignore Growth Controls*, SAN ANTONIO EXPRESS-NEWS, Oct. 16, 2005, at A1, *available at* http://www.mysanantonio.com/news/environment/stories/MYSA101605.1A.vested.main.3d67547.html.

197. *Id.*

198. *Id.*

199. *See id.* (discussing the breadth of Texas's "' vested rights' law").

developer's rights under existing law will be protected by the Vested Rights Statute once the master plan is submitted. Although there are exceptions to the applicability of Chapter 245, they are limited to those specifically enumerated in the statute. The new protections offered by recent changes in the law are indicative of the trend in vested rights through the years—vested rights began small, but periodically the Texas Legislature has expanded them.

However, a municipality seeking to contravene vested rights is not the only obstacle an owner or developer may face. Public opinion can often affect the manner in which a city council chooses to approach development projects. Given the current and expected growth experienced by many Texas cities, it is likely owners and developers in these communities may see the same kinds of comments in the arena of public opinion. For that reason, it is important for owners and developers to exercise their vested rights and seek to enforce those rights if municipalities refuse to hold true to Chapter 245's mandates.